Office - Supreme Court, U. S.
FILED
SEP 11 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 606

CARROLL O. STILL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

R. K. WISE,
WARREN E. MILLER,
Counsel for Petitioner.

C. T. MCDONALD,
Of Counsel.

INDEX.

Subject Index.

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Applicable statute, regulation and court rules involved	2
Statement	3
Specifications of error to be urged	3
Reasons for granting the writ	4
The decision of the court below is contrary to the decisions of this and other courts	15
Conclusion	17

Citations.

Cases:

American National Bank & Trust Company v. *United States* (C. C. A. 7), 104 F. (2d) 783	5
Berry v. *United States*, 85 L. Ed. 576	4, 15
Dooley v. *Pease*, 180 U. S. 126, 45 L. Ed. 457	4, 5, 7
Glazow v. *United States* (C. C. A. 2), 50 F. (2d) 178	5
McNally et al. v. *United States* (C. C. A. 8), 52 F. (2d) 440	5
Miller v. *United States*, 294 U. S. 435	15
Stanley v. *Supervisors*, 121 U. S. 547, 30 L. Ed. 1000	4, 5, 7
United States v. *LePage* (C. C. A. 1), 59 F. (2d) 165	5
United States v. *Clarence P. Arzner*, 287 U. S. 470	5
United States v. *Cox* (C. C. A. 5), 24 F. (2d) 944	5
United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 78 L. Ed. 259	4, 5, 6, 7
United States v. *Phillips* (C. C. A. 8), 44 F. (2d) 689	5
White v. *United States*, 270 U. S. 175, 180, 46 Supreme Court 274, 275, 70 L. Ed. 530	5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 606

CARROLL O. STILL,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on June 11, 1941 (R. 75), in which the insured was held to have been totally and permanently disabled from June 30, 1927.

Opinions Below.

The District Court rendered no opinion. The opinion of the Circuit Court of Appeals (R. 82-93) is reported in 120 F. (2d) at page 876.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered June 11, 1941 (R. 94). The jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented.

Whether the findings of fact of the trial court are "clearly erroneous", within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure, giving due regard to the opportunity of the trial court to judge of the credibility of the witnesses.

Applicable Statute, Regulation and Court Rules Involved.

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant iusurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

This section was restated in substance in subsequent amendments (U. S. C., Title 38, Sec. 511; U. S. C. Sup. VII, Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918[1], "permanent and total disability" was defined as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continu-

[1] This regulation was promulgated by the Director of the Bureau of War Risk Insurance pursuant to the authority contained in Section 13 of the War Risk Insurance Act (added by Section 2 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 399).

ously any substantially gainful occupation shall be deemed * * * to be total disability.

"Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

Rule 52 (a) of the Federal Rules of Civil Procedure provides:

"* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

Statement.

This case, involving war risk insurance total and permanent disability benefits was tried at Florence, South Carolina, May 13, 1940 (R. 65), before Honorable C. C. Wyche, District Judge, without a jury. Pursuant to the provisions of Rule 52 (a) of the Federal Rules of Civil Procedure he found the facts specially (R. 65-72) and stated separately his conclusions of law thereon (R. 72-73) and directed the entry of judgment for plaintiff, finding him totally and permanently disabled from June 30, 1927 (R. 73).

From this action of the trial court the United States appealed to the United States Circuit Court of Appeals for the Fourth Circuit, which court (R. 94) reversed the judgment of the District Court for the reasons set forth in its opinion (R. 82-93).

Specifications of Error to be Urged.

The Circuit Court of Appeals erred:

1. In holding in effect that the finding of the trial court was "clearly erroneous" within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

2. In failing to give "due regard" to the opportunity of the trial court to judge of the credibility of the witnesses.

3. In substituting its opinion as to the weight to be given to the evidence for that of the trial court, who had opportunity to personally observe the witnesses.

4. In holding as a matter of law that, "To support a finding of total and permanent disability, the claimant must show a determined, though unsuccessful, effort to attempt substantially gainful employment which is reasonably suitable for one suffering from the claimed impairment".

5. In not recognizing and following the decision of this Court in the case of *Berry* v. *United States,* 85 L. Ed., 576, as well as the cases of *Stanley* v. *Supervisors,* 121 U. S., 547, 30 L. Ed. 1000; *Dooley* v. *Pease,* 180 U. S. 126, 45 L. Ed. 457; *United States* v. *Jefferson Electric Manufacturing Company,* 291 U. S. 386, 78 L. Ed., 259.

6. In reversing the judgment of the District Court.

Reasons for Granting the Writ.

1. THE CIRCUIT COURT OF APPEALS EXCEEDED ITS AUTHORITY AND JURISDICTION IN THAT IT ASSUMED TO WEIGH THE EVIDENCE, PASS UPON THE CREDIBILITY OF THE WITNESSES, REJECTED COMPETENT MATERIAL, AND RELEVANT EVIDENCE, DREW UNWARRANTED INFERENCES WITHOUT FACTUAL BASIS, AND RE-EXAMINED THE FACTS TRIED BY THE COURT BELOW IN A MANNER CONTRARY TO THE USUAL AND LAWFUL PROCEDURE AND RULE 52 (a) OF THE FEDERAL RULES OF CIVIL PROCEDURE. (SPECIFICATIONS OF ERROR 1-3.)

The evidence as to petitioner's total and permanent disability was conflicting; and therefore was for the determination of the Trial Court, who had opportunity to judge the credibility of the witnesses. There was ample and abundant evidence to support the findings of the Trial Court, and a review of that evidence does not show any of said findings to have been "clearly erroneous".

In determining questions of fact and law in these World War Veterans' insurance cases, the veteran is entitled to a liberal construction of the law. *White* v. *U. S.*, 270 U. S. 175, 180, 46 Supreme Court 274, 275, 70 L. Ed. 530; *American National Bank & Trust Company* v. *United States* (C. C. A. 7), 104 F. (2d) 783; *United States* v. *Cox* (C. C. A. 5), 24 F. (2d) 944; *McNally, et al.,* v. *United States* (C. C. A. 8), 52 F. (2d) 440; *United States* v. *Phillips* (C. C. A. 8), 44 F. (2d) 689; *Glazow* v. *United States* (C. C. A. 2), 50 F. (2d) 178; *United States* v. *LePage* (C. C. A. 1), 59 F. (2d) 165; *United States* v. *Clarence P. Arzner,* 287 U. S. 470.

The weight to be given to the evidence in this "jury waived" case was for the Trial Court, and not for the Circuit Court of Appeals. It must be remembered that where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. *Stanley* v. *Supervisors,* 121 U. S. 547, S. Ct. 1234, 30 L. Ed. 1000, 1002; *Dooley* v. *Pease,* 180 U. S. 126, 131, 132, 21 S. Ct. 329, 331, 45 L. Ed. 457.

In the *Dooley* case, *supra,* this Court held that errors alleged in the findings of the lower court were not subject to revision by the Circuit Court of Appeals, if there was any evidence upon which such findings could be made.

Citing the *Dooley* case, *supra,* with approval, this Court reaffirmed the foregoing rule in the case of *United States*

v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, 407, 54 S. Ct. 443, 78 L. Ed. 259.

This is still the law, and there is abundant evidence in the record to support the findings of the Trial Court.

The District Court found these, among other facts (R. 70):

> "5. I find that plaintiff, although drawing his salary, was unable to, and did not, work regularly, but was absent about three days a week during the years 1926, 1927, 1928 and 1929."
>
> (R-71) "6. I find that plaintiff was discharged by Kelly-Springfield Tire Company and by Fisk Tire Company for inability to perform his duties."
>
> "7. I find that plaintiff's heart condition has been permanent and incurable since or before June 30, 1927, but that it shows only temporary improvements after periods of rest."
>
> "8. I find that plaintiff worked with Kelly-Springfield Tire Company and with Fisk Tire Company when he was physically unable to do any work.
>
> "9. I find that plaintiff's work with Kelly-Springfield Tire Company and with Fisk Tire Company resulted in substantial injury to his health."
>
> "10. I find that from and prior to June 30, 1927, plaintiff has been unable to follow any substantially gainful occupation without material injury to his health or risk of endangering his life."

The District Court made the following, among other, conclusions of law (R. 72):

> "3. I conclude that plaintiff's work record is not so substantial as to be conclusive evidence that he was not disabled from working without serious injury to his health from June 30, 1927, to date * * *."
>
> "(R-73) 8. I, therefore, find and hold that plaintiff was totally and permanently disabled on June 30, 1927."

The evidence of the insured's work record as summarized by the Court of Appeals in its findings of fact (R. 65-70) and which appears in the record is ample to support the findings of the trial court.

The Court of Appeals in its opinion (R. 92) stated, "there was not even a suggestion of any heart ailment until long after the controlling date, June 30, 1927." However, the Court of Appeals also stated, "Dr. Bruce testified that, after considering the entire history of the case, he was of the opinion that appellee had suffered a severe heart attack in 1926. Accepting this testimony for what it is worth in the face of the many actual examination by Government doctors, we still do not believe that there is even substantial evidence to support the finding in question."

It will thus be seen that the Circuit Court of Appeals weighed the evidence, did not give to it the favorable inferences to which petitioner was entitled, and substantiated its opinion on the evidence for that of the trial Judge who personally observed the witnesses.

While the Circuit Court of Appeals stated that it accepted Doctor Bruce's opinion that petitioner had suffered a severe heart attack in 1926, yet it is apparent that it weighed Doctor Bruce's opinion against that of government physicians. The court below apparently rejected this competent, material, and relevant evidence and reexamined the facts. This was clearly contrary to law. *Stanley* v. *Supervisors,* 121 U. S. 547, 7 S. Ct. 1234, 30 L. Ed. 1000, 1002; *Dooley* v. *Pease,* 180 U. S. 126, 131, 132, 21 S. Ct. 329, 331, 45 L. Ed. 457; *United States* v. *Jefferson Electric Manufacturing Company,* 291 U. S. 386, 407, 54 S. Ct. 445, 78 L. Ed. 259.

While the Circuit Court of Appeals in its opinion (R. 90) held that petitioner's work record does not conclusively negative a finding of total permanent disability, yet a reading of the opinion of the court below indicates that it

grounded its action in reversing the District Court to a considerable extent upon petitioner's work record.

The evidence abundantly supports the action of the Trial Court some of which is set forth below:

> "Doctor John L. Bruce testified (R. 38, 39):
>
> Q. From the history of the case, which Mr. Still states, that he was carried to the hospital in 1926, that is with a complete (T., 33) knockout, was unconscious and had pains in his abdomen and had severe headaches and with the history in 1928, when you saw him, and he finally became your patient—what is your professional opinion as to whether or not he had some heart trouble when he first went to the hospital?
>
> A. My opinion is that Mr. Still had a severe heart attack. I have seen him on I would say four or five occasions when he was unconscious in his home and I have had to get him to the hospital in an unconscious condition and he remained that way from twelve to twenty-four hours.
>
> Q. Now, Doctor, if he had this heart condition back in 1926, 1927 and '28 and '29 and was working for a Tire Company, state whether or not it is your opinion that work was beneficial to him, or harmful to him?
>
> A. The type condition that he has, I don't think it is beneficial to exert himself to any extent. I don't think his type of work, if it required long rides and was exerting to him and was any strain, physically or mentally, I don't think it helped his heart condition any. That is just my opinion, I don't know."

Inferences from all of the foregoing testimony could be and were properly drawn that the work which plaintiff did resulted in substantial injury to his health.

The insured's condition in 1926 and 1927 was about the same as it was at the time of the trial (R. 29). He had to take medicine almost every day and could tell no difference in his condition except the intervals of his disability is more frequent and regular. He takes medicine for extreme

pain in the chest and severe headaches, with nausea (R. 29).

Plaintiff testified that he was paid (R. 32) while working with the Fisk Tire Company whether he worked or not.

Plaintiff received disability benefits from the South Eastern Life Insurance Company from 1931. This fact in and of itself is most persuasive (R. 34).

August W. Elliott testified (R. 34) that he lived in plaintiff's home in 1930 and 1931, he would not consider him a well man, he was in bed quite often and complained of terrible headaches; and would deposit his checks for him when he was unable to carry them to the bank; and his condition was about the same in 1926 as it was at the time of the trial, and in 1930 was no better.

Doctor John L. Bruce testified (R. 35-36) that he saw plaintiff about June, 1928, when he was called to see plaintiff, who was having severe migraine headache (which is of a more serious nature than just an ordinary headache), with vomiting and he was complaining of quite a bit of pain in the upper abdominal region.

He was asked the following questions (R. 38) and answered as indicated below:

> "Q. Now, what about when you made your diagnosis in 1931, after you had an opportunity to really observe him, do you think now, looking back over the history of the case, what about the attack you saw him with in 1928, what do you now think was the trouble with him?
>
> A. There is no doubt in my mind at all that the pain that he was having in the upper abdominal region had some bearing on his heart condition. He had a preliminary diagnosis at that time possibly of an ulcerated stomach and was given Synodal, an intravenous injection for ulcerated stomach. It was just on the market and had just been on the market for a short time and he didn't show any improvement at all, sir, from his treatments. From that diagnosis and the pain, in my opinion, it was a cardiac pain. He

has had the pain and the same type of pain and all symptoms, in my opinion, are the same today as they were the day I saw him with this attack.

(R. 38-39) Q. From the history of the case, which Mr. Still states, that he was carried to the hospital in 1926, that is with a complete (T., 33) knockout, was unconscious and had pains in his abdomen and had severe headaches and with the history in 1928, when you saw him, and he finally became your patient—what is your professional opinion as to whether or not he had some heart trouble when he first went to the hospital?

A. My opinion is that Mr. Still had a severe heart attack. I have seen him on I would say four or five occasions when he was unconscious in his home and I have had to get him to the hospital in an unconscious condition and he remained that way from twelve to twenty-four hours."

The plaintiff testified (R. 28):

"Q. Well then, about what was your condition during 1926 and 1927? Were you able to work?

A. I was with Kelly-Springfield Tire Company and the District Manager had to ride with me part of the time. • • •

Q. How much time were you off, even under those conditions, approximately? • • •

A. The whole thing, taking into consideration the time I was in the hospital, and everything, I think *it would average about three days a week.* (Italics Supplied).

Plaintiff's wife testified (R. 24):

"Q. Did he come home, when working for Kelly-Springfield on Friday or Thursday, or when?

A. He was supposed to get in Friday afternoon but sometimes he would get in earlier, if he could.

Q. During that time did he ever come home during the middle of the week?

A. Numbers of times.

Q. Did his physical condition improve or did it get better or worse?

A. It got a great deal worse."

Plaintiff's wife testified (R. 23):

Q. Now, what was your husband doing at that time?

A. He was with the Kelly-Springfield people.

* * * * * * *

Q. And how long did he continue to work with them, or did he quit, or do you know what happened to him?

A. He didn't quit, he was discharged, I suppose you would call it.

Q. In other words, he lost his job?

A. Yes.

* * * * * * *

(R. 26) Q. How would he be when he got up to go to work Monday, did that little rest in bed help him, was his condition better, did that help him?

A. He still looked very bad and shaky.

Q. In other words, it was an effort for him to get up and start out?

A. It was."

Plaintiff's wife testified (R. 24):

"Q. How did he make out with his work from that time on up until the time he lost his job, how did he make out, that is, his physical condition?

A. Well, he went out, he had the week-ends, but he went out on the road and when he came in he was pretty well worn out. He usually went to bed and had the doctor for the week-end.

Q. What doctor?

A. Well, he had pretty nearly every one in Florence, I think, he had some from the Saunders Memorial, he had Dr. Barnwell and his assistant usually, if he could get them. If he couldn't get them, he would get others.

* * * * * * *

Q. Did his physical condition improve or did it get better?

A. It got a great deal worse.

(R. 25) Q. State whether or not then did his condition, did he get better, when he did stay in bed, would his condition improve or get worse when he was working?

A. Naturally he would feel better when he wasn't working, when he would rest.

Q. Did he finally get a job with Fisk Tire Company?

A. Yes.

Q. How long did he work with them?

A. Not quite a year.

Q. How did he make out with them, did he hold his job, or why did he quit?

A. He lost that one, too.

Q. In the meantime, was his condition getting better or was it getting worse?

A. Getting worse.

(R. 25-26) Q. You knew he had these severe headaches, migraine headaches, from the time you got married?

A. Yes.

Q. And he continued to have them since?

A. Yes.

Q. And have they grown progressively worse? (R. 20).

A. Yes.

Q. How often was he in bed, when he would come home from the Kelly-Springfield work in 1926, 1927, and 1928, and 1929, up to the time he went to the Veterans' Hospital?

A. He usually spent all day Saturday and Sunday in bed.

Q. How would he be when he got up to go to work Monday, did that little rest in bed help him, was his condition better, did that help him?

A. He still looked very bad and shaky.

Q. In other words, it was an effort for him to get up and start out?

A. It was.

Q. I believe in 1931 he went down to the Lake City hospital in Forida? • • •

• • • • • • •

A. I believe it was in 1930. I believe it was December, 1930.

Q. He stayed until February, 1931. You recall his going down?

A. Yes.

• • • • • • •

Plaintiff testified (R. 28):

"Q. Well, then, about what was your condition during 1926 and 1927? Were you able to work?

A. I was with Kelly-Springfield Tire Company and the District Manager had to ride with me part of the time.

• • • • • • •

(R. 28) . How much time were you off, even under those conditions, approximately?

• • • • • • •

(R. 28) A. The whole thing, taking into consideration the time I was in the hospital, and everything, I think it would average about three days a week.

Q. Where were you and what was your condition when you wasn't on the road with them, were you on the bed, or where?

A. Sometimes I would become disabled on the road and would have to stay in the hotel a couple of days in my room.

Q. Why did you leave them?

A. On account of inability to carry on, I couldn't produce."

In 1937 the insured (R. 21), was admitted to a hospital suffering from severe migraine headaches; hypertension and electrocardiagram showed probably a myocardial insuffi-

ciency, cardiac dilatation; myocardial insufficiency. The last diagnosis made in 1937 was "coronary thrombosis with small infarcation; hypertensive heart disease, with coronary sclerosis and myocardial degeneration and aortic dilatation."

As this Court knows, the manner in which a witness talks, his expression of countenance and voice, delivery, inflection and emphasis on words, modulation of voice, change in tone or pitch of voice, and demeanor on the witness stand, all are matters from which significant inferences may be drawn. The Circuit Court of Appeals cannot, by merely reading the record, grasp the significance of some of the answers. For instance:

> "The type condition that *he* has, I don't think it is beneficial to exert himself to *any* extent. I don't think *his* type of work, if it required long rides and was exerting to him and was *any* strain, physically or mentally, I don't think it *helped* his heart condition any. (Italics supplied) (T., 33; S. 30).

Ofttimes. it is more the *manner* in which something is said than *what* is said that conveys the meaning intended by the speaker. And, until court procedure progresses to that point where an exact sound reproduction of the testimony of witnesses by phonograph, dictograph or other mechanical means makes the testimony of the witnesses available to a Court of Appeals and television brings to the Court of Appeals the witnesses' expression, demeanor, attitude and appearance while on the stand, no appellate court can with propriety draw the proper inferences from a printed record on appeal and judge whether witnesses are worthy of belief, trustworthy or even capable of being believed. So, too, until that time comes it is dangerous to the proper administration of justice for an appellate court to undertake, as the court below here did, to draw inferences from cold, lifeless words, devoid of feeling, empty of expres-

sion where a slight inflection changes the thought desired to be conveyed by the speaker, and to reverse a District Judge who tried the facts without giving due regard to his opportunity to judge the credibility of the witnesses.

2. THE DECISION OF THE COURT BELOW IS CONTRARY TO THE DECISIONS OF THIS AND OTHER COURTS.

The Court below, in its opinion unequivocally laid down this rule of law:

> "To support a finding of total and permanent disability, the claimant must show a determined, though unsuccessful, effort to attempt substantially gainful employment which is reasonably suitable for one suffering from the claimed impairment."

This is clearly erroneous as a matter of law when applied, as the Court below did, to the facts in this case. While it is conceded that this would be true of a one-arm man (*Miller* v. *United States*, 294 U. S. 435), yet when applied, as the Court below did, to an insured suffering from a serious heart disability as petitioner was (R. 38-39) where any exertion would be harmful to him and might be fatal, places an unwarranted burden as a matter of law upon this insured. This is contrary to the decision of this and other courts.

This Court, in the case of *Berry* v. *United States*, 85 L. Ed. 576 held:

> "* * * It was not necessary that petitioner be bedridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled. * * * " (Citing *Lumbra* v. *United States*, 290 U. S. 551.)
>
> "It cannot be doubted that if *petitioner had refrained from trying to do any work at all*, and the same evi-

> dence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work—all of which sooner or later resulted in failure—were made not because of his ability to work but because of his unwillingness to live a life of idleness, even though totally and permanently disabled within the meaning of his policies (citing *United States* v. *Rice*, 72 F. (2d) 676; *Nicolay* v. *United States*, 51 F. (2d) 170, 173; *United States* v. *Lawson*, 50 F. (2d) 646, 651; *United States* v. *Godfrey*, 47 F. (2d) 126, 127; *United States* v. *Phillips*, 44 F. (2d) 689, 691). (Italics supplied.)

It will thus be seen that an insured can recover even though he "*refrained from trying to do any work at all*", under the decision of this Court in the Berry case.

The foregoing quoted portion of the decision of the Court below is clearly in direct conflict with the law as announced by this Court in the *Berry* case.

It is also contrary to the law as announced by the United States Circuit Court of Appeals for the Fifth Circuit in *United States* vs. *Fancher*, 84 F. (2d) 306. In that case plaintiff and his witnesses said that he had not worked because he was unable to do so. Notwithstanding the absence of the work record or attempt to work the Court of Appeals sustained a verdict for the plaintiff over the government's contention that there were certain gainful forms of work that the insured could have performed.

The decision of the lower court, in holding as a matter of law, that in order to support a finding of total and permanent disability an insured must show a determined effort to attempt to work is contrary to the law as settled by this Court in *Lumbra* v. *United States*, 200 U. S. 551, where this Court said:

> "The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat

his claim of total permanent disability. He may have worked when really unable and at the risk of endangering his health or life. *United States* v. *Phillips* (C. C. A. 8th) 44 F. (2d) 689, 691; *United States* v. *Godfrey* (C. C. A. 1st), 47 F. (2d) 126; *Carter* v. *United States* (C. C. A. 4th), 49 F. (2d) 221, 223; *United States* v. *Lawson* (C. C. A. 9th), 50 F. (2d) 646, 651; *Nicolay* v. *United States* (C. C. A. 10th), 51 F. (2d) 170. 173.

The effect of the decision of the court below is that the insured must work, even though such work is injurious to him, in order to recover total and permanent disability benefits. Clearly this is not the law.

Conclusion.

For the reasons stated, it is respectfully submitted that this application for a writ of certiorari should be granted.

R. K. WISE,
Columbia, South Carolina,
WARREN E. MILLER,
Washington, D. C.,
Attorneys for Petitioner.

C. T. McDONALD,
Florence, S. C.,
Of Counsel.

(6246)

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Pertinent regulations and rules	2
Statement	3
Argument	4
Conclusion	9

CITATIONS

Cases:	
Aetna Life Ins. Co. v. *Kepler*, 116 F. (2d) 1	4
Berry v. *United States*, 312 U. S. 450	8, 9
Dooley v. *Pease*, 180 U. S. 126	5
Gates v. *General Casualty Co. of America*, 120 F. (2d) 925	5
Hoskins v. *United States*, 100 F. (2d) 343	8
Lumbra v. *United States*, 290 U. S. 551	8, 9
McDaniel v. *United States*, 108 F. (2d) 450	4
Manning v. *Gagne*, 108 F. (2d) 718	4
Miller v. *United States*, 294 U. S. 435	8
O'Quinn v. *United States*, 70 F. (2d) 599	8
Proechel v. *United States*, 59 F. (2d) 648	8
Stanley v. *Supervisors of Albany*, 121 U. S. 535	5
United States v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386	5
United States v. *Luckinbill*, 65 F. (2d) 1000	8
Miscellaneous:	
Bulletin No. 1, Treasury Department (Regulations and Procedure, U. S. Veterans' Bureau, Vol. II, pp. 1233–1237)	2
Treasury Decision No. 20 (Regulations and Procedure, United States Veterans' Bureau, Vol. I, p. 9)	2
Rule 52 (a) Federal Rules of Civil Procedure	2, 3, 4

420415—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 606

CARROLL O. STILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION TO PROCEED ON A TYPEWRITTEN RECORD AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court, rendered as a part of its findings of fact and conclusions of law (R. 65–73), is not reported. The opinion of the circuit court of appeals (R. 82–93) is reported in 120 F. (2d) 876.

JURISDICTION

The judgment of the circuit court of appeals was entered July 11, 1941 (R. 94). The petition for a writ of certiorari was filed September 11, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the finding of the district court that the petitioner was totally and permanently disabled while his war risk term insurance remained in effect was clearly erroneous within the meaning of Rule 52 (a) of the Federal Rules of Civil Procedure.

PERTINENT REGULATIONS AND RULES

The contract sued on was in the form of a regulation promulgated on October 15, 1917 (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233–1237), which was issued pursuant to statutory authorization (c. 105, sec. 402, 40 Stat. 409); it provided, so far as here pertinent, for payment to the insured of monthly benefits at the rate of $5.75 for each $1,000 of insurance, in the event he became totally and permanently disabled while the insurance was in force.

By regulation issued on March 9, 1918 (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. 1, p. 9), total and permanent disability was defined as:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially

> gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *.

Rule 52 (a) of the Federal Rules of Civil Procedure for the District Courts of the United States provides in part:

> In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Supplement to Brief for Appellant filed in the court below is also filed herewith as a supplement to this brief because it includes the pertinent portions of the exhibits, none of which have as yet been furnished to this Court by the circuit court of appeals.[1]

STATEMENT

This suit was brought October 3, 1936, by the petitioner, Carroll O. Still, to recover total perma-

[1] References to this supplement are herein preceded by the symbol "S."; references to the typewritten record are preceded by the symbol "R."

nent disability benefits under a $10,000 contract of war-risk term insurance issued to him during his naval service from May 10, 1917, to December 12, 1918 (R. 2–4).

The case was tried without a jury on the sole issue whether the petitioner was totally and permanently disabled on June 30, 1927, the date on which his insurance expired for nonpayment of premiums (R. 65). At the conclusion of the evidence, the district court entered findings of fact (R. 65–71) and conclusions of law (R. 71–73) to the effect that the petitioner was totally and permanently disabled from heart trouble on the controlling date. On appeal by the Government (R. 76) from judgment for the petitioner (R. 74–75), the court below reversed (R. 94), holding in effect (R. 82–93) that the finding and conclusions of the trial court were "clearly erroneous" within the meaning of Rule 52 (a) of the Rules of Civil Procedure.

ARGUMENT

1. In reviewing the evidence in order to determine whether the findings of the trial court were "clearly against the weight of the evidence" (R. 85), the court below properly did not exceed the well-established scope of appellate reexamination prescribed by Rule 52 (a) of the Federal Rules of Civil Procedure. *Aetna Life Ins. Co.* v. *Kepler,* 116 F. (2d) 1, 4–5 (C. C. A. 8); *McDaniel* v. *United States,* 108 F. (2d) 450, 452 (C. C. A. 7); *Manning* v. *Gagne,* 108 F. (2d) 718, 720–721 (C. C.

A. 1); *Gates* v. *General Casualty Co. of America*, 120 F. (2d) 925, 929 (C. C. A. 9).[2]

2. The court below held that the finding of the trial court that petitioner had sustained the burden of proving his total permanent disability on June 30, 1927, was plainly in error and unsupported by substantial evidence. A review of the pertinent evidence amply justifies this conclusion of the court below.

The petitioner, prior to entering the naval service in 1917, attended high school and college (S. 47) and had been employed as an automobile mechanic and general utility man (R. 9). He was an instructor at an airfield while in the Navy (S. 48). After his discharge from the service on December 12, 1918, he was a traveling salesman for the same employer for whom he had previously worked (R. 9–10); later petitioner was associated with other automobile agencies (R. 28). From August 1, 1924 to June 30, 1928 he was employed by the Kelly-Springfield Tire Company as a traveling salesman (R. 32, S. 45–46), and after selling automobiles on commission for two or three months (R. 25, 29), was employed by the Fisk Tire Company as a traveling salesman from March 16, 1929, to Febru-

[2] *Stanley* v. *Supervisors of Albany*, 121 U. S. 535, *Dooley* v. *Pease*, 180 U. S. 126, and *United States* v. *Jefferson Electric Mfg. Co.*, 291 U. S. 386, cited by petitioner as in conflict (Pet. 5–6, 7) were rendered prior to the effective date of the Federal Rules of Civil Procedure, and, in any event, do not in fact appear to prescribe a different scope of review than that observed by the court below.

ary 14, 1930 (R. 32, S. 47–48). His employment at both of the tire companies was on a salary basis with traveling expenses in addition (R. 32, S. 45–46, 47). Late in 1930 he engaged in the drug business for four or five months (R. 16, 18–19). He engaged in no business or work thereafter.

There was testimony on petitioner's behalf that since he had left the naval service he had suffered at times from severe migraine headaches, nausea and pain in the chest (R. 25, 27, 28), and that he had suffered a spell of unconsciousness in 1926 under circumstances not disclosed by the evidence (R. 7–9, 23, 30). The reports of numerous examinations of petitioner by Government physicians (S. 48–72), however, disclose no mention by the petitioner to the examining physicians of any of these complaints until February 24, 1931, when petitioner for the first time complained of headaches[3] (S. 53, 55). There were no complaints of pain in the abdomen until July 1931 (S. 57) and none concerning nausea until 1932 (S. 61).[4]

The petitioner was paid his full salary throughout his employment with the tire companies (R. 32, S. 45–46).

---

[3] Four of the reports were made prior to June 30, 1927, and one on July 12, 1927 (S. 51–52). The complaints in the reports prior to February 1931 were limited to the condition of petitioner's teeth and feet (R. 48, 50, 51).

[4] Petitioner maintained on cross-examination that the physician who made the first four examinations "knew" of his headaches (R. 30). He did not, however, suggest any reason for their omission from the reports.

The petitioner relies (Pet. 8) upon the opinion expressed by his medical witness, Dr. Bruce, that if the petitioner had "this heart condition" while working for a tire company, the witness did not think that the condition was "helped" by the work (R. 38–39). But such testimony can hardly be regarded as an expression of opinion that even the strenuous work of a traveling salesman in which the petitioner was engaged at the time in question would substantially injure his health. In any event, the witness assumed the existence of a heart condition during that period, and we submit that, as held in effect by the court below (R. 92), there was no substantial evidence that such a condition existed at that time. The Government's medical testimony was to the effect that the heart condition was only in its initial stage as late as December 1930 (R. 47–48, 56–58). The opinion of Dr. Bruce, on which the petitioner also relies (Pet. 8), that he had a heart attack on the occasion when he became unconscious in 1926 (R. 38–39) was lacking in probative value, because the witness was asked to assume material facts of which there was no evidence; i. e., that the petitioner at the time of the attack had "pains in his abdomen" and "severe headaches" [5] (R. 38–39).

[5] While it is true that petitioner testified that he had "severe migraine, nausea, and pain in the chest" at times since he had left the naval service (R. 25, 27, 28), nothing in the record shows that he was so suffering at the particular time when he became unconscious.

It is significant, moreover, that prior to December 1930, the petitioner made no claim for disability insurance benefits either from the Government or from a private insurance company (R. 30, 33) and did not spend any time in a hospital except for the three-day period in 1926 when he became unconscious under circumstances not disclosed by the evidence.

Even if it were to be assumed that the petitioner's condition disabled him from engaging in the occupation of a traveling salesman, that fact alone would not constitute substantial evidence of total disability within the meaning of the insurance contract. The burden was upon him to show further that he was unable to engage in any other substantially gainful occupation of a less strenuous nature for which he was qualified or for which he could qualify himself by a reasonable amount of study and training. *Lumbra* v. *United States,* 290 U. S. 551, 559; *Miller* v. *United States,* 294 U. S. 435, 441; *Berry* v. *United States,* 312 U. S. 450, 455; *Proechel* v. *United States,* 59 F. (2d) 648, 649–650 (C. C. A. 8); *United States* v. *Luckinbill,* 65 F. (2d) 1000 (C. C. A. 10); *O'Quinn* v. *United States,* 70 F. (2d) 599 (C. C. A. 5); *Hoskins* v. *United States,* 100 F. (2d) 343, 344–345 (C. C. A. 5). It seems clear that petitioner was qualified at least as late as June 30, 1927, to engage in many of such

occupations or could have been readily trained to do so.[6]

CONCLUSION

The decision of the court below is correct and involves no conflict. The case turns on its own facts. We respectfully submit that the petition should be denied.

CHARLES FAHY,
Acting Solicitor General.
JULIUS C. MARTIN,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
FENDALL MARBURY,
RICHARD S. SALANT,
Attorneys.

OCTOBER 1941.

---

[6] In the course of its opinion, the court below stated that to support a finding of total permanent disability, the claimant must "show a determined, though unsuccessful, effort to attempt substantially gainful employment which is reasonably suitable for one suffering from the claimed impairment." Petitioner urges that this "rule of law" is in error and in conflict with *Berry* v. *United States*, 312 U. S. 450. But we do not understand that the decision of the court below hinged upon this statement, since the court considered all relevant factors and expressly held that the mere fact that petitioner continued to work did not negative a finding of total permanent disability. Contrary to petitioner's suggestion (Pet. 15), the court's statement was intended to be limited to claimants who could work without injury to their health. In any event, the *Berry* case is clearly distinguishable on its facts. Clearly there are no fixed formulae for determining the existence of total permanent disability; the question is peculiarly one turning on the circumstances of each case. *Lumbra* v. *United States*, 290 U. S. 551, 558–559.

U. S. GOVERNMENT PRINTING OFFICE: 1941